

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Amy L. Silverstein, 154221, 12 Gough St. #2, San Francisco, CA 94103 John Ormonde, 308524, 12 Gough St. #2, San Francisco, CA 94103 Robert T. Petraglia, 264849, 12 Gough St. #2, San Francisco, CA 94103 Adam Hooberman, 306038, 12 Gough St. #2, San Francisco, CA 94103 TELEPHONE NO: 415 593 3502 FAX NO: 415 593-3501 ATTORNEY FOR (Name): Square, Inc.	FOR COURT USE ONLY <div style="font-size: 2em; font-weight: bold; letter-spacing: 0.5em;">FILED</div> Superior Court of California County of San Francisco <div style="font-size: 1.2em; font-weight: bold;">SEP 06 2019</div> <div style="font-size: 1.2em; font-weight: bold;">CLERK OF THE COURT</div> BY: <u>J. I. [Signature]</u> <div style="text-align: right; font-weight: bold;">Deputy Clerk</div>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: 400 McAllister Street CITY AND ZIP CODE: San Francisco, 94012 BRANCH NAME:	
CASE NAME: Square, Inc., v. City and County of San Francisco, et al.	
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)
CASE NUMBER: 19-579061 JUDGE: DEPT:	

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input checked="" type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

a. <input type="checkbox"/> Large number of separately represented parties b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve c. <input type="checkbox"/> Substantial amount of documentary evidence	d. <input type="checkbox"/> Large number of witnesses e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries; or in a federal court f. <input type="checkbox"/> Substantial postjudgment judicial supervision
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3. Remedies sought (check all that apply): a. ☒ monetary b. ☐ nonmonetary; declaratory or injunctive relief c. ☐ punitive

4. Number of causes of action (specify): One

5. This case ☐ is ☒ is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: September 6, 2019

Amy L. Silverstein

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

BY FAX

SU MMONS (CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**

City and County of San Francisco; José Cisneros, Treasurer and Tax Collector of the City and County of San Francisco; Does 1 through 50

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

Square, Inc.

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. ¡AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es): San Francisco Superior Court

400 McAllister Street
San Francisco, California 94102

CASE NUMBER
(Número del Caso): 19-579061

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Amy Silverstein, 12 Gough Street # 2, San Francisco, California 94103, (415)593-3502

DATE: September 6, 2019
(Fecha)

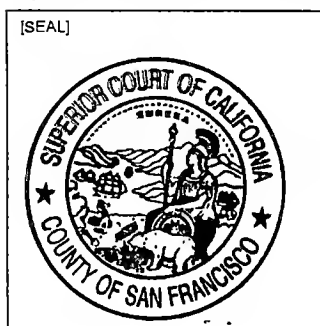
Clerk, by
(Secretario)

, Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

Jaqueline L. Payette



NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):

3. ☐ on behalf of (specify):

under: ☐ CCP 416.10 (corporation)

☐ CCP 416.20 (defunct corporation)

☐ CCP 416.40 (association or partnership)

☐ other (specify):

4. ☐ by personal delivery on (date):

☐ CCP 416.60 (minor)

☐ CCP 416.70 (conservatee)

☐ CCP 416.90 (authorized person)

CLERK OF THE COURT

1 Amy L. Silverstein (Bar No. 154221)
2 John Ormonde (Bar No. 308524)
3 Robert T. Petraglia (Bar No. 264849)
4 Adam Hooberman (Bar No. 306038)
5 Silverstein & Pomerantz LLP
6 12 Gough Street, 2nd Floor
7 San Francisco, California 94103
8 Telephone: (415) 593-3502
9 Facsimile: (415) 593-3501
10 E-Mail: asilverstein@sptaxlaw.com

11 Attorneys for Plaintiff
12 SQUARE, INC.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 CITY AND COUNTY OF SAN FRANCISCO

15 UNLIMITED JURISDICTION

16 SQUARE, INC.,

17 Plaintiff,

18 v.

19 CITY AND COUNTY OF SAN
20 FRANCISCO; JOSÉ CISNEROS,
21 TREASURER AND TAX COLLECTOR OF
22 THE CITY AND COUNTY OF SAN
23 FRANCISCO, and DOES 1 through 50,

24 Defendants.

FILED

Superior Court of California
County of San Francisco

SEP 06 2018

CLERK OF THE COURT

BY J. Laparotte
Deputy Clerk

CGC-19-579061

Case No. _____

VERIFIED COMPLAINT FOR REFUND OF
SAN FRANCISCO GROSS RECEIPTS TAX

BY FAX

1 Plaintiff Square, Inc. ("Square" or "Plaintiff"), in accordance with California Government
2 Code Section 945.6 and San Francisco Business and Tax Regulations Code ("SF Tax Code")
3 Sections 6.15-1 through 6.15-4, hereby files this Complaint for Refund of Gross Receipts Tax
4 ("Complaint"). This Complaint constitutes an appeal of the denial of a claim for refund of gross
5 receipts tax paid by Plaintiff to the City and County of San Francisco.

6 Plaintiff states and alleges as follows:

7 PARTIES

- 8 1. Plaintiff at all times mentioned herein was a corporation organized and existing under the
9 laws of the State of Delaware. Plaintiff is headquartered at 1455 Market Street, #600, San
10 Francisco, California, 94103.
- 11 2. Defendant City and County of San Francisco ("Defendant" or the "City") is a political
12 subdivision of the State of California. The City is a "local government" as defined in the
13 California Constitution, Article XIII C, Section 1(b).
- 14 3. Defendant Jose Cisneros ("Treasurer"), at all times relevant herein, was the Treasurer and
15 Tax Collector of the City. He is sued in his official capacity only.
- 16 4. The true names and capacities, whether individual, corporate, or otherwise, of Does 1
17 through 50, inclusive, are unknown to Plaintiff, who therefore sues such defendants by
18 fictitious names. Plaintiff will amend this Complaint to allege the Doe defendants' true
19 names and capacities once they are ascertained.

20 JURISDICTION AND VENUE

- 21 5. Jurisdiction is vested in this Court under Sections 940 *et seq.* of the California Government
22 Code.
- 23 6. Venue is proper in this Court pursuant to California Code of Civil Procedure Section 394.

24 BASIS OF THE ACTION

- 25 7. Plaintiff brings this action in accordance with California Government Code Section 945.6
26 and SF Tax Code Sections 6.15-1 through 6.15-4. This is an action for refund of San
27 Francisco Gross Receipts Tax paid by Plaintiff to Defendants pursuant to the SF Tax Code.
28 Plaintiff is entitled to a refund for several reasons. First, the City's tax as applied to Square is

1 unconstitutional. Second, the City incorrectly classified Square’s primary business activities
2 for purposes of the SF Tax Code as “financial services” rather than “information.” Third,
3 Plaintiff was improperly taxed on receipts collected and retained by third parties that were
4 never in Square’s possession or control. Fourth, Plaintiff was improperly denied a credit for
5 taxes paid to other jurisdictions on the same gross receipts taxed by the City. Finally, Square
6 was improperly taxed on gross receipts from the sale and lease of tangible personal property
7 in the City.

8 **FACTS**

- 9 8. Square is a San Francisco-based company with offices across the United States and in
10 Canada, Japan, Australia, Ireland and the United Kingdom.
- 11 9. Jack Dorsey co-founded Square in 2009 to enable businesses (“Sellers”) to accept card
12 payments, which historically had been prohibitively costly or complicated for many small-and
13 medium-sized businesses.
- 14 10. Since then, Square has developed a cohesive commerce ecosystem that helps Sellers start, run,
15 and grow their businesses.
- 16 11. San Francisco is home to a community of technology companies, which have established the
17 City as one of the world’s leading technology and innovation hubs. Square competes with
18 these companies for talent and capital.
- 19 12. Square’s employees in San Francisco, which currently number approximately 2,200, make up
20 the majority of Square’s workforce and account for the majority of its payroll costs. Square’s
21 San Francisco employees also made up the majority of its workforce and accounted for the
22 majority of its payroll costs for 2014 and 2015.¹
- 23 13. Excluding sales and marketing, legal, finance, facilities, IT, human resources departments and
24 the executive assistant teams (hereinafter referred to as “overhead”), the vast majority of
25 Square’s total operating expenses for 2014 and 2015 are for designing, engineering and
26 producing software and related hardware products.

27
28 ¹ All further figures concerning Square’s activities and operations relate to the 2014 and 2015 years
unless otherwise noted.

- 1 14. Square's production processes for 2014 and 2015 were primarily focused on the production
2 of software. Square invests heavily in recruiting, training, and hiring talented software
3 engineers in order to create sophisticated software-based products and related hardware.
4 Excluding overhead, for 2014 and 2015, the vast majority of Square's employees were either
5 software engineers or employees supporting them.
- 6 15. In 2014 and 2015, Square heavily invested its revenues in employees and research and
7 development.
- 8 16. Square also uses proprietary software it developed when it calculates the risk that a payment
9 card transaction is fraudulent before authorizing it.
- 10 17. After a Seller accepts a card payment and initiates a transaction, third parties "process" the
11 transaction. These third parties are referred to as Payment Network Participants (acquiring
12 banks and issuing banks) and Payment Processors (service providers processing transactions
13 under an acquiring bank's bank identification number or Interbank Card Association
14 number).
- 15 18. The Payment Processors and Payment Network Participants have the right to and do retain
16 their fees for processing card transactions (collectively, "Interchange Fees") from the amount
17 charged to a consumer at the time of sale prior to transferring the remaining funds to Square
18 (for further transfer to the Seller). As such, Square never receives the Interchange Fees and
19 does not have control over the settlement of Interchange Fees.
- 20 19. On its original San Francisco Gross Receipts Tax returns, Square reported and included the
21 Interchange Fees in its total gross receipts under Square's accrual method of accounting.
- 22 20. Excluding Interchange Fees reduces Square's total gross receipts for Tax Periods 2014 and
23 2015 such that Square would be entitled to a refund of the full amount of its Claim for
24 Refund, which, as discussed in Paragraph 36 below, was filed in January, 2019.
- 25 21. Square paid 2014 and 2015 gross receipts-based taxes to, amongst others, the jurisdictions of
26 the State of Washington and the State of Ohio, some of which was for taxes imposed by
27 subdivisions of the State(s).
- 28

- 1 22. More than half the gross receipts taxed by the States of Washington and Ohio (or their
2 subdivisions) were also taxed by the City of San Francisco. If Square was granted a credit
3 for taxes paid to these jurisdictions on the same gross receipts taxed by the City, as provided
4 for in SF Tax Code Section 954(g), it would have been entitled to a refund of approximately
5 70% of the total amount of the refund claimed in its claim for refund.
- 6 23. Square paid San Francisco Gross Receipts tax on gross receipts from the sale or lease of
7 tangible personal property in San Francisco for the Tax Periods 2014 and 2015.

8 **PROCEDURAL BACKGROUND AND**
9 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

- 10 24. Square timely filed its San Francisco Gross Receipts and Payroll Tax Returns for Tax Periods
11 2014 and 2015. In these returns, Square computed its tax liability on the basis that, for
12 purposes of the SF Tax Code, Square was engaged in the business activity of information,
13 taxable under SF Tax Code Section 953.2.
- 14 25. The San Francisco Office of the Treasurer & Tax Collector conducted an audit of Square's
15 San Francisco Gross Receipts and Payroll Tax Returns for Tax Periods 2014 and 2015.
- 16 26. On or about June 12, 2017, the San Francisco Office of the Treasurer & Tax Collector issued
17 a Notice of Tax Audit Deficiency for Tax Periods 2014 and 2015 ("Notice"). The Notice
18 indicated that Plaintiff owed additional tax and interest for both Tax Periods 2014 and 2015.
- 19 27. The basis for the tax adjustment, as set forth in the Notice, was a reclassification of Square's
20 business activity for purposes of the SF Tax Code to financial services, taxable under SF Tax
21 Code Section 953.6.
- 22 28. Square's San Francisco competitors for labor and capital in the technology sector (i.e., other
23 software companies) are taxed by the City as information under SF Tax Code Section 953.2,
24 and, thus, benefit from a lower tax rate as well as the significantly more favorable
25 apportionment methodology.
- 26 29. On or about July 11, 2017, Plaintiff filed a Petition for Redetermination.
- 27 30. On or about November 16, 2017, Plaintiff attended a hearing on the Petition for
28 Redetermination before the Tax Collector. At the hearing, Plaintiff supplemented its Petition

1 for Redetermination. Following the hearing, the Tax Collector requested additional
2 information, which Plaintiff timely provided.

3 31. On or about February 8, 2018, the Tax Collector issued a Tax Collector Decision on Petition
4 for Redetermination (“Decision”), upholding the determination that for purposes of the SF
5 Tax Code, Square was engaged in the business activity of financial services.

6 32. The Decision also granted Square a credit under SF Tax Code Section 954(g) for taxes paid
7 to local jurisdictions in the State of Washington. But the Decision denied a credit for state-
8 level, gross receipts-based taxes paid to Washington and Ohio.

9 33. The Decision rejected Square’s position that the Interchange Fees collected by third parties
10 were not Square’s taxable gross receipts.

11 34. The adjusted tax liability per the Decision increased Square’s total liability to the City for
12 both Tax Periods 2014 and 2015.

13 35. On or about February 26, 2018, Plaintiff satisfied its outstanding San Francisco tax
14 obligations for Tax Periods 2014 and 2015 by paying \$1,272,934.41.

15 36. On or about January 10, 2019, Plaintiff filed a claim for a refund of taxes pursuant to
16 California Government Code Section 910 *et seq.* and SF Tax Code Section 6.15-1 *et seq.*
17 (“Claim for Refund”).

18 37. Defendant did not provide notification of any insufficiency of the Claim for Refund pursuant
19 to the California Government Code or the San Francisco Municipal Code. *See* California
20 Government Code Section 911.

21 38. On or about March 8, 2019, the City and County of San Francisco denied Plaintiff’s Claim
22 for Refund.

23 39. Plaintiff has exhausted all administrative remedies. *See* SF Tax Code Section 6.15-3.

24 **CAUSE OF ACTION**

25 **ACTION FOR REFUND OF SAN FRANCISCO GROSS RECEIPTS TAX**

26 40. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1
27 through 39 above.
28

The City's Tax as Applied to Plaintiff is Unconstitutional

(Commerce Clause and Due Process)

41. Article I, Sec. 8 of the U.S. Constitution (hereinafter the "Commerce Clause") requires that state and local taxes be externally consistent and, therefore, not tax extraterritorial values.

42. The U.S. and California Constitutions incorporate the same requirement through their due process clauses. The Fourteenth Amendment to the U.S. Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." Article I, § 7 of the California Constitution provides, "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

43. Because the SF Tax Code apportions to San Francisco Plaintiff's gross receipts that are attributable, in whole or in part, to payments from Square's customers located outside San Francisco, the City taxes extraterritorial gross receipts.

44. A reasonable approach to apportioning gross receipts for purposes of a gross receipts tax would include recognition of the locations from which the gross receipts were derived.

45. The apportionment methods required by the SF Tax Code cause the amount of plaintiff's gross receipts apportioned to the City to be out of all appropriate proportion to the gross receipts derived by plaintiff from sales to customers in the City.

46. Therefore, the City's gross receipts tax, as applied to Plaintiff, violates the Commerce Clause of the U.S. Constitution and the Due Process Clause of the U.S. and California Constitutions. Plaintiff is entitled to a refund to the extent that the City has taxed extraterritorial values.

The City's Tax as Applied to Plaintiff is Unconstitutional

(Equal Protection)

47. The Fourteenth Amendment to the U.S. Constitution prohibits the states from denying to any person within its jurisdiction the equal protection of the laws.

48. Article I, Sec. 7 of the California Constitution provides that a person may not be denied the equal protection of the laws.

49. SF Tax Code Sections 953.1 through 953.8 use one apportionment method for some taxpayers and a different apportionment method for other taxpayers.

1 50. The use of different apportionment methods causes taxpayers using one apportionment
2 method to owe a greater or lesser amount of tax than similar taxpayers using a different
3 apportionment method.
4 51. The differing apportionment methods treat similarly situated taxpayers differently.
5 52. There is no rational basis for the differential treatment described in the preceding paragraph.
6 53. Therefore, the SF Tax Code violates the equal protection guarantees of the 14th Amendment
7 to the U.S. Constitution and Article 1, Sec. 7 of the California Constitution. Plaintiff is
8 entitled to a refund to the extent it paid tax exceeding that computed using the SF Tax Code's
9 most favorable apportionment formula.

10 **The City's Tax Violates California Government Code 37101(b)**

11 54. California Government Code Sec. 37101(b) requires that the measure of the City's gross
12 receipts tax fairly reflects the proportion of gross receipts from sales that actually occur
13 within the City.
14 55. The City's gross receipts tax includes within its measure gross receipts from sales made by
15 taxpayers and Plaintiff that did not actually occur within the City.
16 56. Because the Tax Code imposes tax on gross receipts from sales made by taxpayers and
17 Plaintiff that did not actually occur with the City, on its face and as applied to Plaintiff, the
18 Tax Code violates the requirement that the measure of the City's gross receipts tax fairly
19 reflects gross receipts for sales that actually occur within the City.
20 57. Plaintiff is entitled to a refund of gross receipts tax it paid to the City to the extent the
21 measure of such tax is based on sales made by Plaintiff that did not actually occur within the
22 City.

23 **Plaintiff is Entitled to Relief Under SF Tax Code Section 957**

24 58. SF Tax Code Section 957 provides, "The Tax Collector may, in his or her reasonable
25 discretion, independently establish a person's gross receipts within the City and establish or
26 reallocate gross receipts among related entities so as to fairly reflect the gross receipts within
27 the City of all persons."
28

1 59. Because the SF Tax Code apportions to San Francisco Plaintiff's gross receipts that are
2 attributable, in whole or in part, to payments from Square's customers located outside San
3 Francisco, Plaintiff's gross receipts under the SF Tax Code do not fairly reflect the gross
4 receipts within the City.

5 60. Therefore, Plaintiff is entitled to apportionment relief under SF Tax Code Section 957, and a
6 corresponding refund.

7 **Plaintiff is Not Properly Taxed under SF Tax Code Section 953.6**

8 61. San Francisco's Gross Receipts Tax is imposed on "every person engaging in business within
9 the City" and is "measured by the person's gross receipts from all taxable business activities
10 attributable to the City." SF Tax Code Section 953. The SF Tax Code further provides, "A
11 person's liability for the gross receipts tax shall be calculated according to Sections 953.1
12 through 953.7." "Person" is defined to include a "corporation." SF Tax Code Sections 952
13 and 6.2-15.

14 62. SF Tax Code Section 953.2(d) provides: "Information includes producing and distributing
15 information or cultural products; providing the means to transmit or distribute those products;
16 and processing data; it includes business activity described in NAICS code 51."

17 63. NAICS is an acronym for the North American Industry Classification System. *See* SF Tax
18 Code Section 952.4 ("NAICS code" means the numerical classification for business
19 activities established in the North American Industry Classification System used by federal
20 governmental agencies to classify business establishments; references in this Article to
21 particular numerical NAICS codes are intended to apply the definitions and descriptions
22 adopted in that system as of the effective date of this Article.").

23 64. NAICS is a "production-oriented" business activity classification system, which focuses on
24 the inputs and production processes of industries to classify business activities.

25 65. This is in contrast to the North American Products Classification System ("NAPCS"), which
26 is a market-based system for the classification of goods and services.

27 66. By analyzing Square's inputs and production processes, whether through operating expenses,
28 headcount, or otherwise, most of Square's activities are properly classified in NAICS 51.

1 67. NAICS 51 applies to the extent that Square creates software and distributes it to Sellers and
2 uses its own software to determine the risk that a transaction is fraudulent.

3 68. Square's production processes are primarily focused on the development and production of
4 software. Square heavily invests in recruiting, training and hiring talented software engineers
5 in order to create sophisticated software-based products. Excluding overhead, the vast
6 majority of Square's employees are either software engineers or employees supporting them.

7 69. Square's costs also confirm that Square's primary business activity is the development and
8 production of software. Excluding overhead, the vast majority of Square's total operating
9 expenses are for developing and producing software and related hardware products.

10 70. Therefore, most, if not all, of Square's business activities for purposes of the SF Tax Code
11 must be classified in NAICS 51 and taxed under SF Tax Code Section 953.2 and Square is
12 entitled to a refund for the full amount requested in its Claim for Refund.

13 **Plaintiff's Taxable Gross Receipts do not Include Amounts Retained by Third Parties**

14 71. SF Tax Code Section 952.3 provides that gross receipts "includes but is not limited to all
15 amounts that constitute gross income for federal income tax purposes" and shall be
16 recognized "at the time such receipts are recognized as gross income for federal tax reporting
17 purposes."

18 72. The Interchange Fees, which the Payment Processors and Payment Network Participants
19 withhold in the course of processing transactions, are not required to be included in Square's
20 gross income for federal income tax purposes because they were never received by Square
21 and never subject to Square's control and, thus, would not be recognized under the federal
22 income tax "cash method."

23 73. Because the Interchange Fees would not be included in Square's gross income under the cash
24 method, the cash method and the accrual method would result in different total gross receipts
25 for Square over its lifetime. Although Square is an accrual method taxpayer, the accrual
26 method of accounting yields to the cash method where applying the accrual method would
27 change a company's total gross income over its lifetime.

28

1 74. Because federal tax law does not require the inclusion of Interchange Fees in Square's gross
2 income for federal income tax purposes and Interchange Fees are not actually received by
3 Square, they are not "gross receipts" for purposes of the San Francisco Gross Receipts Tax.
4 As such, Square is entitled to a tax refund for the full amount of its Claim for Refund.

5 **Plaintiff Is Entitled to a Credit for Gross Receipts**

6 **Taxes Paid to Both San Francisco and Any Other Taxing Jurisdiction**

7 75. SF Tax Code Section 954(g) provides:

8 To the extent that any taxpayer has paid a substantially similar tax to
9 any other taxing jurisdiction on any gross receipts attributed to the
10 City and taxed under this Article, the tax paid to such taxing
11 jurisdiction shall be credited against the tax due under this Article; in
12 no event shall this credit reduce the taxpayer's liability to less than
13 zero.

14 76. The City granted Square a credit for taxes paid to "local jurisdictions" in the State of
15 Washington to the extent that the receipts were double taxed, but it refused to grant such a
16 credit for Washington and Ohio state-level taxes on the grounds that a "substantially similar
17 tax [paid] to any other taxing jurisdiction" does not include taxes paid to the taxing
18 jurisdictions of Washington and Ohio.

19 77. Square paid 2014 and 2015 gross receipts-based taxes to, amongst others, the jurisdictions of
20 the State of Washington and the State of Ohio, some of which was for taxes imposed by
21 subdivisions of the State(s). More than half the gross receipts taxed by the States of
22 Washington and Ohio (or their subdivisions) were also taxed by the City of San Francisco.

23 78. The State of Washington imposes a gross-receipts based tax, which is substantially similar
24 tax to the City of San Francisco's Gross Receipts Tax, Section 950 *et seq.* The tax is
25 imposed:

26 Upon every person engaging within this state in any *business activity*
27 other than or in addition to an activity taxed explicitly under another
28 section in this chapter or subsection (1) or (3) of this section; as to

1 such persons the amount of tax on account of such activities is equal to
2 the *gross income of the business* multiplied by the rate of 1.5 percent.

3 Revised Code of Washington (“RCW”) Section 82.04.290(2)(a) (emphasis added).

4 79. The State of Washington defines “Gross income of the business” as:

5 the value proceeding or accruing by reason of the transaction of the
6 business engaged in and includes gross proceeds of sales,
7 compensation for the rendition of services, gains realized from trading
8 in stocks, bonds, or other evidences of indebtedness, interest, discount,
9 rents, royalties, fees, commissions, dividends, and other emoluments
10 however designated, all *without any deduction* on account of the cost
11 of tangible property sold, the cost of materials used, labor costs,
12 interest, discount, delivery costs, taxes, or any other expense
13 whatsoever paid or accrued and without any deduction on account of
14 losses.

15 RCW Section 82.04.080(1) (emphasis added).

16 80. The State of Washington employs a market-based sourcing rule to calculate the gross income
17 (i.e., gross receipts) of the business from services attributable to the state; specifically, the
18 receipts are sourced based upon “where the customer received the benefit of the taxpayer’s
19 service.” *See* RCW Sections 82.04.460(1), 82.04.462(3)(b)(i).

20 81. Because San Francisco uses the proportion of payroll in the City to attribute receipts to the
21 City, a double-tax results, and some of the same gross receipts taxed by the City are also
22 taxed by the State of Washington. *See* SF Tax Code Sections 953.2, 953.6 and 956.2.

23 82. Square is entitled to a credit for all gross receipts taxes paid to the State of Washington on the
24 same gross receipts taxed by the City.

25 83. The State of Ohio also imposes a tax that is substantially similar tax to San Francisco’s gross
26 receipts tax, which is a “commercial activity tax for the privilege of doing business in this
27 state” on “taxable gross receipts” situated to the state. *See* Ohio Revised Code (“ORC”)
28 Sections 5751.02(A), 5751.01(G) (defining “taxable gross receipts” to mean “gross receipts

1 situated to [Ohio] under section 5751.033 of the Revised Code”), 5751.03(A) (providing the
2 applicable tax rate).

3 84. Ohio defines “gross receipts” as “the total amount realized by a person, *without deduction for*
4 the cost of goods sold or other expenses incurred, that contributes to the production of gross
5 income of the person, including the fair market value of any property and any services
6 received, and any debt transferred or forgiven as consideration.” ORC Section 5751.01(F)
7 (emphasis added).

8 85. Ohio employs a market-based apportionment approach for sourcing gross receipts. Under
9 ORC Section 5751.033, “Gross receipts from the sale of all other services, and all other gross
10 receipts not otherwise situated under this section, shall be situated to this state in the proportion
11 that the purchaser’s benefit in this state with respect to what was purchased bears to the
12 purchaser’s benefit everywhere with respect to what was purchased.”

13 86. Because San Francisco uses the proportion of payroll in the City to attribute receipts to the
14 City, a double-tax results, and some of the same gross receipts taxed by the City are also
15 taxed by the State of Ohio. *See* SF Tax Code Sections 953.2, 953.6 and 956.2.

16 87. Square is entitled to a credit for all gross receipts taxes paid to the State of Ohio, for 2014
17 and 2015, on the same gross receipts taxed by the City.

18 88. In sum, Square is entitled to a credit for taxes paid to other jurisdictions on the same gross
19 receipts taxed by the City and on that basis a refund of approximately 70% of the total
20 amount claimed in its Claim for Refund.

21 **Plaintiff Is Entitled to a Refund of Taxes Paid on Gross Receipts from the Sale or Lease of**
22 **Tangible Personal Property in the City**

23 89. The Bradley-Burns Uniform Local Sales and Use Tax Law (“Bradley-Burns Act”), Cal. Rev.
24 & Tax. Code (“RTC”) § 7200 *et seq.* preempts taxation of gross receipts from the sale or
25 lease of tangible personal property by local jurisdictions.

26 90. The Bradley-Burns Act requires that local sales and use tax laws be identical (with minor
27 exceptions) to the state sales and use tax laws, and that local jurisdictions “contract . . . with
28

- 1 the State Board of Equalization to perform all functions incident to the administration or
2 operation of the [local] sales and use tax ordinance.” See RTC §§ 7202, 7203.
- 3 91. The Bradley-Burns Act does not preempt local taxes if the tax is “substantially different”
4 from sales taxes and use taxes. See RTC § 7203.5 (“Nothing in this section shall be
5 construed as prohibiting the levy or collection by a city, county, redevelopment agency, or
6 city and county of any other *substantially different tax* authorized by the Constitution of
7 California or by statute or by the charter of any chartered city.”).
- 8 92. Whether a tax is “substantially different” must be determined by its incidence rather than its
9 name.
- 10 93. The California sales tax is imposed on the “retailer” and is “[f]or the privilege of selling
11 tangible personal property at retail.” RTC § 6051. The tax is calculated by applying the tax
12 rate to the “gross receipts of any retailer from the sale of all tangible personal property sold at
13 retail.” *Id.* “Gross receipts” mean “the total amount of the sale or lease or rental price, as the
14 case may be, of the retail sales of retailers . . .” RTC § 6012. The definition of “sale” also
15 includes “[a]ny lease of tangible personal property in any manner or by any means
16 whatsoever,” with certain exceptions. RTC § 6006(g). Courts have found, “[i]n reality, the
17 sales tax is not a tax on sales but is an excise tax for the privilege of conducting business
18 measured by gross receipts from sales.” *Henry’s Rests. of Pomona, Inc. v. State Bd. of*
19 *Equalization*, 30 Cal. App. 3d 1009, 1019 (1973).
- 20 94. The San Francisco Gross Receipts Tax imposes a tax on retailers based on gross receipts
21 from the sale of tangible personal property in the City (SF Tax Code Section 953.1) and the
22 leasing of tangible personal property in the City (SF Tax Code Section 953.7).
- 23 95. The taxes imposed by SF Tax Code Sections 953.1 and 953.7 are not substantially different
24 from a sales tax.
- 25 96. Because the taxes imposed under SF Tax Code Sections 953.1 and 953.7 are not
26 “substantially different” from the sales tax, they are preempted by the Bradley-Burns Act and
27 Square is entitled to a refund of taxes paid on gross receipts from the sale or lease of tangible
28 personal property.

1 PRAYER FOR RELIEF

2 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

3 1. For a refund of Gross Receipts Tax paid by Plaintiff for the periods 2014 and 2015 in
4 the amount of \$1,272,934.41, or such other amount as the evidence may show, plus interest from the
5 date of payment as provided by law;

6 2. For Plaintiff's attorneys' fees and costs of suit as permitted by law; and

7 3. For such other and further legal and equitable relief as the Court deems just and
8 reasonable.

9
10 Dated: September 6, 2019

11
12 SILVERSTEIN & POMERANTZ LLP

13
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15 By: _____

16 Amy Silverstein
17 Attorneys for Plaintiff
18 Square, Inc.
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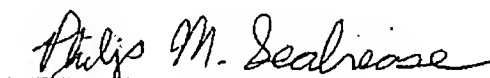
VERIFICATION

I, Philip M. Seabrease, am the Head of Tax at Square, Inc., and I am authorized to make this verification.

I have read the foregoing Verified Complaint for Refund of San Francisco Gross Receipts Tax and know the contents thereof. I am informed and believe that the information contained in said document is true, and on that ground I allege that the information stated therein is true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 6th day of September 2019 at San Francisco, California.



Philip M. Seabrease
Head of Tax
Square, Inc.